United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

B

P/S

ORIGINAL 74-1155

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

RICHARD CEPULONIS,

Defendant-Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

---

APPELLANT'S BRIEF

JOSEPH J. LOMBARDO
Assigned appellate counsel
16 Court Street
Brooklyn, N.Y. 11241
(212) 855-1770

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---------- X

UNITED STATES OF AMERICA

-against-

RICHARD CEPULONIS,

Defendant.

----------X

PRELIMINARY STATEMENT

This is an appeal from the denial of a motion to suppress evidence, and from a judgment of conviction by the Hon. Jack B. Weinstein, United States District Judge, Eastern District of New York.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Was the search and seizure of defendant's hotel room, his suitcase therein, and his car constitutionally permitted? It is submitted that this appeal turns upon the appellate court's answer to this question.

STATEMENT OF THE CASE

The defendant was arrested on September 15, 1973 in the corridor of a hotel, Holiday Inn, pursuant to an arrest warrant (p.6)* and indicted on September 20, 1973 on 2 counts for violation of Title 26, U.S.C. 5861(d) (first count) and Title 18, U.S.C. 922(g) (Second Count).

Assigned counsel moved to suppress evidence pursuant to rule 41. It was stipulated by counsel for the Government

and the defense that the evidence adduced at the suppression hearing constitute the trial evidence and that Count I of the indictment be submitted to the Court for its decision.

After the suppression hearing the Court denied the motion to suppress and found the defendant guilty beyond a reasonable doubt of Count I of the indictment.

GOVERNMENT'S DIRECT CASE (S.A. MARBLE)

On September 15, 1973, Cepulonis was arrested in the corridor by the elevator of the Holiday Inn, 440 West 57th Street, New York by six agents of the F.B.I. Defendant was searched and manacled and then forcible entry was gained by said agents to Room 818 of said Inn. This room was registered to Thomas Wilkinson, 15060 Sprague Road, Middleburg Heights, Ohio, and was occupied by the defendant, his girlfriend (now his wife) and their child. The room was searched and various items of contraband found in the room, which items are not relevant on this appeal, except for a bandolier with seven clips from an M 16 automatic rifle found by the agents in a suitcase (p 14). From Cepulonis' person the agents removed a wallet and keys to a Ford car's ignition and trunk (p.17). The agents proceeded to La Guardia Airport and there found a 1970 Ford, dark blue, with a black vinyl top in parking lot 4, opposite the Eastern Airlines shuttle with Ohio license plates(p.18). The trunk was

footnote *references are to pages in the transcript of the trial minutes.

opened with the keys taken from Cepulonis at the time of his arrest (p.18). In the trunk were found the two guns which are the guns mentioned in Counts 1 and 2 of the indictment (p.18). On the defendant's person at the time of his arrest was a bill of sale for the Ford made out to Thomas Henry Wilkonson.

CROSS-EXAMINATION

At the time of Cepulonis' arrest he was at the elevator. Six agents, two with shotguns, the others armed, arrested him, manacled him in front, and within 30 seconds pushed their way into Room 818 (p.24) where the agents searched the room and its contents including suitcases in which were found the M 16 rifle clips (p.24). There was no testimony as to how long the Ford car had been parked at the LaGuardia Airport (p28), but it was determined the car had been there since Friday (p.29), and the search of the said car was on Sunday following.

It was stipulated (p32) authorities had no search warrant for the room or the car (p.32).

THE DEFENSE

Mary Tracy testified that on Saturday about 4:00 P.M. Cepulonis got a phone call, left the room (No. 818) and within minutes, six or seven men rushed into the room with Cepulonis who was handcuffed. They searched the room for about 45 minutes and went through two closed suitcases. Neither she nor Cepulonis consented to the search (p.34,35). In the course of this witness'

cross-examination, the Court observed (p.42):

"THE COURT: Well, the issue is whether the defendant gave the authorities permission to enter the room and search the suitcase.

MR. KAPLAN: Your Honor, the witness's credibility is also an issue. I'm trying to pursue that.

THE COURT: I don't see that she's added anything to the case, I must say. She didn't give permission and she didn't hear the defendant give permission.

MR. KAPLAN: I'll try to direct myself specifically to the suppression issues."

The defendant testified on his own behalf. He said he was on prison furlough from a Massachusetts prison where he was serving a sentence and did not return (p.46). On September 15, 1973 about 5:00 P.M. he was in room 818 of the Holiday Inn in New York. He received a phone call from one Mary Cosgrove, a girl friend of Francis Lovell. She asked him to join them in the Lounge for a drink. He left the room, went to the elevator, pressed the button and was arrested (p.47) by Government agents, all displaying firearms. They handcuffed him, walked him from there to his room, knocked, burst in, and searched the room without anyone's consent (p.49). A search of a closed suitcase was

made by agents without anyone's consent. He never gave his consent to a search of the Ford car (p.50) found by agents in the La Guardia Airport parking lot.

THE ARGUMENT

THE SEARCHES AND SEIZURES

The forced entry into the hotel room and the discovery by the agents of the M 16 bandolier and clip within the closed suitcase in the hotel room clearly provided the basic knowledge underlying the succeeding police searches of the Ford car for the M 16 rifle. Thus, like dominoes, if the first search and seizure is unlawful, the succeeding ones will fall as fruits of the poisoned tree

ENTRY INTO THE HOTEL ROOM

A search incidental to an arrest is limited to the area within the immediate custody and control of the defendant when he was arrested, thus preventing the defendant from procuring a weapon or destroying evidence, Chimel vs California 395 U.S. 752. The agent did not directly admit conducting an exploratory search of the hotel room for evidence, yet on the basis of his testimony, the seizure of the contraband in the hotel room is clearly unlawful. Having been arrested in the corridor, Cepulonis never would have asked to be allowed to return to the room, or consented to police search thereof. Cases in an analogous area confirm the inferences to be drawn from the defendant's knowledge of whether contra-

band will be discovered. In decisions dealing with an appraisal of the voluntariness of a consent to search, courts may take into consideration that probability of the defendant's knowledge that contraband would be found as a result of the search U.S. vs Dornblut, 261 F2nd 949 (2nd Cir. 1958); U.S. vs Martin, 176 F2nd, 262 (S.D.N.Y. 1959); U.S. vs Maceod, 207 F2nd 853 (7th Cir.1953). Where the defendant is under the misapprehension that nothing damaging will be discovered by a search, an inference may arise as to voluntary consent (e.g. Honig vs U S 208 F,2nd 916(8th Cr. 1953); U.S. vs Dornblut, supra. On the other hand, if a defendant is aware that contraband is in his possession, a court might logically assume that he would be resistant to a search (see e.g. Judd vs U.S. 190 F2nd, 649 (D.C. Circuit 1951); Herter vs U.S., 27 F2nd 521 (9th Cir.1928); U.S. vs Slusser, 270 F818 (S.D. Ohio 1921). Consequently, it is not at all likely that the agent's story of the consent to search the hotel room is accurate. Rather, in view of the manner in which six armed agents descended upon the defendant in the hotel corridor, and in view of the testimony of Cepulonis and Mary Tracy coupled with the inherent improbability that Cepulonis voluntarily led the agents to the contraband or consented to a search of his room, it is certain that the agents discovered the M 16 bandolier and clips and other contraband through an exploratory search in violation of Chimel. The agents were seeking to execute an arrest warrant issued by a United States Magistrate in Boston charging Cepulonis with unlawful flight to avoid prosecution; he having failed to return to prison after a

furlough. The search for and discovery of the M 16 rifle was precipitated by the finding of the M 16 bandolier and clips in the suitcase in Cepulonis' room. The suitcase was not found in the hotel room until after Cepulonis had been arrested and secured in the hotel corridor, a distance from the closed door of his hotel room. With his hands manacled and surrounded by six armed officers, he could not possibly have entered the room, drawn a weapon from the suitcase therein, or destroyed evidence (Chimel vs California, 395 U.S. 752 (1969). Yet, the police forcibly entered the room and opened and searched it and the suitcase without a warrant.

In People vs Marshall, 69 Cal. Rptr 585(1968) the Supreme Court of California considered whether a brown paper bag containing contraband could be opened and the contents seized without a warrant. Chief Justice Traynor, discussing the plain view doctrine (the rationale advanced by the government to sustain the search of the suitcase), wrote:

> "In the present case the brown paper bag itself was not contraband. Only by prying into the hidden interior...could the officer be sure that he was seizing contraband and nothing more. The fact that the container was only a brown paper bag instead of a packing box, purse, handbag, briefcase, hatbox, suffbox, trunk, desk

or chest of drawers is immaterial. It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container or the material it is made of. a search of the container is necessary to disclose its contents. "

A search demands a search warrant. Obviously then Marshall is directly in point with the present case, for when the police found the closed suitcase in the hotel room, they merely had discovered a container and its contents could not be inspected without a search warrant. The reasoning and rationale of Marshall was confirmed by the Supreme Court in Coolidge vs New Hamphshire (91 S.Ct. 2022). Even though the Court should find the suitcase was open and its contents in plain view, the entry into the hotel room required consent, and failing that, a search warrant. A hotel room is protected in favor of the occupant under the Fourth Amendment (Stover vs California 376 U.S. 483).

THE SEARCH OF THE FORD CAR

A search of the defendant after his arrest disclosed car keys and a wallet containing information as to a Ford car. The agent testified that: "I tried the keys in the trunk of at least twenty cars" (p.67). A search of the parked car without a search warrant was unconstitutional and the fruits of the search, the

fruit of the poisoned tree. While under certain circumstances a warrantless stop and search of a moving vehicle is permitted under the doctrine of Carroll vs U.S. (267 U.S. 132), a warrant is necessary for the search of an impounded car (Preston vs U.S. 376 U.S. 364). In this case the car was not going anywhere. It was parked. It was not impounded but had it been, a search warrant would have been necessary before a valid search could be made of it (Preston supra). The search was exploratory by the Government's own witness' statement. "I tried the keys in the trunk of at least twenty cars" (supra). Indeed, Coolidge specifically holds that "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it" there can be no inadvertant find, and a warrant is required for the search. The police could not inspect the parked car in Coolidge without a warrant. They could not inspect the parked Ford car here.

CONCLUSION

The search and seizure of the contraband in the hotel room, and in the parked car should be suppressed and the con viction set aside and the indictment dismissed.

Respectfully submitted,

JOSEPH J. LOMBARDO
Assigned Appellate Counsel

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 15 day of April, 1974 deponent served the within BRIEF upon U.S. Atty – Eastern Dist. of N.Y.

attorney(s) for Appellee

in this action, at 225 Cadman Plaza East
Brooklyn, N.Y.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this
15 day of April 1974

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976